JD(ATL)–09–12
Pawtucket, RI

STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

TD BARTON FOODS LLC D/B/A
C-TOWN SUPERMARKET

and **CASES** **01-CA-061241**
01-CA-063902
UNITED FOOD AND COMMERCIAL **01-CA-067404**
WORKERS UNION, LOCAL 328,
AFL-CIO, CLC

Elizabeth Vorro, Esq.,
for the Acting General Counsel.
Christopher Bijesse, Esq. (Law Office of Christopher Bijesse), for the Respondent.
Betsy Ehrenberg, Esq. (Pyle Rome Ehrenberg PC),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. On December 13, 2011, this case was heard in Cranston, Rhode Island. On July 14, 2011, the original charge in this proceeding was filed by the United Food and Commercial Workers Union, Local 328, AFL-CIO, CLC (the Union) against TD Barton Foods LLC d/b/a C-Town Supermarket (TD Barton or the Respondent).[1] The Union represented a bargaining unit of service employees (the unit), who were employed by TD Barton at its Pawtucket, Rhode Island supermarket, prior to the store being placed under a receivership and liquidated.

On December 12, 2011,[2] a second amended complaint issued, which alleged, inter alia, that TD Barton violated Section 8(a)(1), (3) and (5), and 8(d), of the National Labor Relations Act (the Act) by: advising unit employees that they were no longer unionized; unilaterally laying off unit employees and reducing their weekly work hours; laying off employees due to their Union activities; failing to recognize the Union or meet to negotiate a successor agreement; failing to abide by the collective bargaining agreement by violating its dues deduction, seniority

[1] I find that the underlying charges, and connected amendments, were properly filed and served.
[2] All dates herein are in 2011, unless otherwise indicated.

and layoff provisions; failing to furnish relevant information to the Union; and failing to notify the Union regarding the sale of its business or bargain over the effects. In its answer, TD Barton denied any unlawful action.[3]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the parties' briefs,[4] I make the following:

Findings of Fact

I. Jurisdiction

At all material times, TD Barton, a corporation, with an office and place of business in Pawtucket, Rhode Island operated a supermarket. Annually, in conducting such operations, it derived gross revenues exceeding $500,000, and purchased and received at the supermarket goods valued in excess of $5,000 directly from points located outside of Rhode Island. As a result, it admits, and I find, that it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The majority of the controlling facts herein are undisputed. On September 6, 2007, the Union was certified by the National Labor Relations Board (the Board) to represent the unit. At that time, the supermarket was owned by JD Food Corp. The parties consequently negotiated a collective bargaining agreement covering the unit, which ran from August 1, 2008 to July 31, 2011 (the 08-11 CBA). (GC Exh. 2).

In 2009, TD Barton, which was owned by Toribio Diaz, purchased the supermarket from JD Food Corp. Following the sale, TD Barton agreed to recognize the Union and assume the 08-11 CBA in its entirety. (GC Exh. 3). In 2010, however, TD Barton began experiencing financial difficulties, which prompted the sale of the supermarket and instant litigation.

B. TD Barton's Termination Letter

On April 13, TD Barton alerted the Union that it was "terminating the Agreement effective 1st August, 2011." (GC Exh. 4). Diaz testified that he erroneously believed that, upon the expiration of the 08-11 CBA, he was free to oust the Union, and unilaterally convert the supermarket into a union-free shop.

C. Union Efforts to Begin Negotiations

On April 20, the Union requested TD Barton to commence bargaining over a successor agreement. (GC Exh. 5). Union Executive Assistant Timothy Melia and Organizer Carlos

[3] The answer was filed and admitted at the hearing. See (GC Exh. 1(z)).

[4] The Union did not file a post-hearing brief.

Gonzalez credibly testified that, after TD Barton failed to respond to their several follow-up phone calls, they eventually reached Diaz and coaxed him to attend a short meeting at their offices in June. Melia stated that, at this meeting, Diaz remained unwilling to negotiate or schedule future sessions, and adamantly asserted that his Union obligations would cease, after the 08-11 CBA expired on July 31.

D. First Information Request

On June 24, the Union requested the following information:

- An up-to-date seniority roster . . . ;
- Current addresses and social security number of all employees . . .;
- Date of employment; Current rates of pay; Current classification;
- Regularly scheduled hours of work . . . .[5]

(GC Exh. 6). In this letter, the Union again sought to commence bargaining. TD Barton failed to respond.

E. Union's July Supermarket Visit

In early July, Melia visited the supermarket. He credibly testified that he encountered Alberto Durand, Store Manager, and asked him when negotiations would begin. He related that Durand told him to call Diaz, who then failed to return multiple messages. He stated that Durand said that the supermarket was struggling, and implied that it could be sold. He added that employees also reported seeing potential buyers, who seemed to be touring the store. He indicated, however, that TD Barton never directly advised the Union that it was selling the supermarket.

Juan Gomez, a unit employee, credibly testified that, in July, prior to the expiration of the 08-11 CBA, Store Manager Durand told him that "at the end of the contract, there will be no more contracts with the Union." (Tr. 179). He recalled Durand lamenting that the supermarket was very difficult to sell because it was unionized.

F. Second Information Request and Effects Bargaining Demand

Melia stated that, in light of the liquidation rumors, he opted to seek confirmation from TD Barton. On November 10, he requested the following information:

> All documents that relate to any change in the ownership of TD Barton . . . effective at any time from January 1, 2011 . . . . [including] all contracts, agreements . . . and documents that set forth all terms and conditions of sale, including but not limited to:
>
> a) the buyer's liability, if any, for legal and/or financial obligations of the seller and;

[5] This letter also sought financial information, which was not encompassed by the complaint, and, thus, not part of the proceeding.

> b) the employment status as of the effective date of the sale of any and all persons employed by the seller within the six months preceding the effective date of the transfer of ownership.
>
> [T]he Union hereby demands to bargain concerning the effects and impact on employees' terms and conditions of employment of any contemplated or pending change in ownership of C-Town Supermarket.

(GC Exh. 7). Melia added that he also sought this information in order to assess the Union's rights under section 2 of the 08-11 CBA (i.e., the successorship clause), which provided:

> This Agreement shall be binding upon the Company . . . and its successors . . . and no provision . . . shall be nullified . . . as a result of any consolidation, sale, transfer, assignment . . . . The Company agrees that it will not conclude . . . the above described transactions unless an agreement has been entered into [that] . . . this Agreement shall . . . be binding on . . . [the] business organization continuing the business. It is the intent . . . shall remain in effect . . . regardless of any change of any kind in . . . ownership.

(GC Exh. 2 at 1). TD Barton ignored the information and effects bargaining request.

G. Reduced Hours and Layoffs

1. Reduced Hours

Melia testified that, in May or June, unit employees contacted the Union and complained about their work hours being cut. Diaz admitted to cutting work hours, beginning in April, and explained that he proportionally cut everyone's schedule by 5 to 10 hours per week, as a consequence of declining sales. It is undisputed that TD Barton never advised the Union before unilaterally cutting hours.

2. Layoffs

The 08-11 CBA contained a detailed layoff procedure. Article 21 provided:

> **Section 1**
>
> A. Seniority shall be defined as an employee's length of continuous service with the Company in any bargaining unit position from the first date of employment . . . . The principle of seniority shall apply . . . in all matters, including layoffs . . . .
>
> **Section 2— Layoffs and Recalls**
>
> A. Layoffs and recalls shall be governed by inverse seniority.
>
> B. In the event of a layoff, the junior employee within a classification will be laid off using their overall Company seniority. When it is determined that the layoff shall come from a specific department within the store, the

person with the least storewide seniority in that department shall be the person laid off regardless of their time in said department.

C. When it becomes necessary to layoff, a full-time employee may bump a junior part-time employee. First, within the department, and then in total store. . . .

H. When the Company determines that . . . layoffs are necessary, the Company and the Union shall meet to discuss the application of the Agreement set forth in this Article prior to any . . . layoff. . . .

(GC Exh. 2). The 08-11 CBA also afforded stewards "top seniority in layoffs." (Id.).

Melia testified that, in June, the supermarket began laying off employees. The following chart, which describes weekly work hours, demonstrates the timing of these layoffs, and shows that several, less senior, employees maintained employment (i.e., Bonilla, Vasquez ,and Fernandez), even after several, highly senior, employees were separated (i.e., Juan and Nelson L. Gomez, Ramos and Orellana):

Employee Name	**Seniority Dates in Inverse Order**	**Wk. end. 5/20**	**Wk. end. 6/30**	**Wk. end. 7/21**	**Wk. end. 8/25**	**Wk. end. 9/29**	**Wk. end. 10/27**	**Wk. end. 11/3**	**Wk. end. 11/25**
Nayla Almeida	9/18/10	28.75	**0**	**0**	**0**	**0**	**0**	**0**	**0**
Jalizsha Bonilla	9/3/10	24.75	24.08	0	0	0	0	21.73	20.13
Melissa Ruiz	3/12/10	10.05	**0**	**0**	**0**	**0**	**0**	**0**	**0**
Julio V. Sierra	1/22/10	29.76	35.65	34.82	38.15	27.41	3.93	**0**	**0**
Felix Rodriguez	1/8/10	31.42	**0**	**0**	**0**	**0**	**0**	**0**	**0**
Nelly Latour	12/12/08	28.16	0	27.76	31.65	**0**	**0**	**0**	**0**
Maria Ramirez	10/17/08	6.7	40	39.78	0	26.65	28.84	28.15	**0**
Jose Garcia	9/26/08	35.08	35.12	39.25	**0**	**0**	**0**	**0**	**0**
Carlos D. Santos	8/1/08	33.89	30.58	40	0	33.39	23.88	7.15	**0**
Gerardo M. Nolasco	1/18/08	35.44	31.80	46.79	48	35.28	27.74	12.73	**0**
Alexis Vasquez	11/30/07	35.50	36.23	40	39.07	31.55	28.08	27.65	21.72
Alfonso R. Fernandez	10/19/07	35.87	40	0	35.73	26.93	40	40	37.31
Isabel Gomes	10/12/07	28.90	37.74	28.73	40	28.78	29.28	29.32	**0**
Mireya Serrano	7/27/07	34	**0**	**0**	**0**	**0**	**0**	**0**	**0**
Carlos Peguero	7/13/07	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**
Francis M. Torres	6/2/06	27.67	31.95	19.58	24.02	30.32	30.03	29.93	28.37
Juan Gomez	10/26/05	36.62	36.30	38.67	40.90	30.85	5.13	**0**	**0**
Nelson L. Gomez	5/20/05	35.27	40	36.91	37.32	29.67	5.12	**0**	**0**
Gillermina V. Ramos	11/22/02	26.67	33.40	32	34	40.73	34.28	34.47	**0**
Miguel Orellana (steward)	1/23/09	0	36.32	37.35	45.95	37.07	10.13	**0**	**0**

(GC Exhs. 14-42). It is undisputed that TD Barton failed to confer with the Union before conducting layoffs.

Polanco, Store Manager, credibly testified that, with his input, Diaz determined the scope and timing of these layoffs. He added that some employees approached him and requested a layoff, in order to become eligible for unemployment benefits. He denied that layoffs were prompted by Union activities, although he failed to explain why Orellana, the steward and most

senior employee, as well as Union activists Juan and Nelson L. Gomez, were laid off before several less senior workers. He acknowledged that Orellana and the Gomez brothers were active Union supporters, who often complained to the Union about workplace issues. He recollected that their complaints often involved allegations of supervisors performing bargaining unit work.

Diaz indicated that ongoing financial problems prompted the layoffs. He did not dispute that the Union was never offered the chance to negotiate over this matter.

H. Failure to Remit Union Dues

The 08-11 CBA contained a detailed dues deduction procedure. Article 3 provided:

> **Section 1**
> The Company agrees to deduct weekly Union dues and initiation fees, including arrears, from the wages of . . . members of the Union . . . who . . . sign an authorization card for such deductions.
>
> The Company shall remit each month to the Union, . . . initiation fees, membership dues, and arrears . . . .

(GC Exh. 2 at 3).

Melia testified that the entire unit authorized TD Barton to deduct and remit their dues. He added that TD Barton failed to remit such monies since April 30. See also (GC Exh. 8).[6]

Gonzalez credibly testified that he visited the supermarket in August to inquire about the dues delinquency. He stated that, at that time, he met Aida, the bookkeeper, who stated that:

> Diaz told her that there was no longer a Union contract . . . and therefore she didn't need to take any dues or remit any monies to the local office.[7]

(Tr. 54).

I. August Telephone Conversation

Gonzalez credibly testified that, in August, he phoned Diaz about his failure to schedule negotiations, dues delinquency, rumored business sale, and other matters. He recounted this exchange:

> Gonzalez: I heard that you are no longer taking dues out from the members and I want to know why.
> Diaz: There's no Union contract. The Union contract expired July 31st. I don't have to do that. The Union is no longer in place.

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[6] The Union's records demonstrate that, from April 30 through October 29, TD Barton owed dues totaling $4132.35 (i.e. $153.05 in weekly dues times 27 weeks of delinquency). See (GC Exhs. 8–9).

[7] I denied TD Barton's objection that this testimony was inadmissible hearsay. See Fed. R. Evid. 801(d)(2)(agent's admissions are not hearsay).

Gonzalez: I think that you're wrong. The contract is now expired. But, that doesn't mean there's no Union contract. There's a Union contract in place and you need to bargain in good faith. And plus, you agreed that you were going to do that.

Diaz: Well. I don't have to do that. We can't take the contract anymore. There's no Union. I can't, I'm trying to sell the business. I have seven buyers, but, because of the Union, I can't sell.

Gonzalez: What do you mean about that?

Diaz: With the Union, no buyer wants to take this place . . . . We are not doing [well] . . . . We are suffering. We don't have any money. So I need to cut people's hours.

Gonzalez: You know, if you're going to cut hours, you need to bargain . . . . You . . . have to respect seniority and you have to bargain over the hours being cut. You can't just random[ly] cut hours . . . .

(Tr. 55-59). Diaz did not dispute Gonzalez's account.

J. September Meeting

In late September, Gonzalez and Melia met with Diaz at the Union's offices. Gonzalez credibly recalled Diaz reiterating that the business was failing, being marketed to potential buyers, and that he was not obligated to negotiate because, "there was no contract." He stated that Diaz, nevertheless, committed to meet with the Union again on October 13, but, subsequently cancelled the meeting.[8]

K. Loss of Supermarket

Diaz lost the supermarket in November, after TD Barton defaulted on its financial obligations. See (R. Exhs. 1-3). At that time, the supermarket was placed under a receivership, and its assets were liquidated and redistributed.

III. Analysis

A. Section 8(a)(1) Allegation[9]

This Section 8(a)(1) allegation, which alleges that, on October 21, Polanco told employees that there was no longer a union at the supermarket, lacks merit. The Board has held that informing "employees that there was no union when . . . there was, undermined the Union's representative role," and violates Section 8(a)(1). See *Spectrum Health*, 353 NLRB 996, 1005 (2009) (two-member decision), adopted 355 NLRB No. 101 (2010), citing *Windsor Convalescent Center*, 351 NLRB 975, 987–988 (2007), enfd. in relevant part 570 F.3d 354 (D.C. Cir. 2009). In the instant case, however, although Durand stated in July that there would be no Union after the 08-11 CBA's expiration,[10] there is no evidence that Polanco made such a

[8] Diaz stated that he cancelled the meeting because his mother was ill, and, thereafter, considered rescheduling to be a moot point after he lost the supermarket in November.

[9] This allegation is listed under pars. 10 and 28 of the complaint.

[10] Counsel for the Acting General Counsel did not seek to amend the complaint to encompass such testimony.

comment on October 21. I find, as a result, that TD Barton did not violate the Act, in the manner alleged.

B. Section 8(a)(5) Allegations

Section 8(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." 29 U.S.C. § 158(a)(5). Section 8(d) defines "bargain[ing] collectively" as "meet[ing] and confer[ring] in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder." 29 U.S.C. § 158(d).

1. Information Requests[11]

TD Barton violated Section 8(a)(5) by neglecting the Union's June 24 and November 10 information requests. An employer must, upon request, provide a union with information, which is necessary and relevant to its representational role. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Relevancy is defined by a broad discovery standard, and it is only necessary to show that requested information has *potential* utility. Id. An employer must, for example, provide information connected to collective bargaining or contract administration. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005).

i. June 24 Request

TD Barton violated the Act by disregarding the Union's June 24 request. This request, which coincided with the expiration of the 08-11 CBA, requested unit information (i.e., seniority dates, wage data, schedules, etc.), which would have aided the Union's anticipated negotiations. TD Barton, accordingly, violated the Act by not providing this information.[12] *A-1 Door & Building Solutions*, 356 NLRB No. 76 (2011).

ii. November 10 Request

TD Barton violated the Act by similarly ignoring the November 10 request. This request, which concerned the rumored sale of the supermarket, would have, inter alia, aided the Union's ability: to conduct effects bargaining; evaluate whether the purchaser was a successor; and enforce its rights under Section 2 of the 08-11 CBA. I find, therefore, that TD Barton violated the Act by failing to provide this information. See *Piggly Wiggly Midwest*, 357 NLRB No. 191 (2012) (requiring the provision of sales and franchise agreements); *Compact Video Services*, 319 NLRB 131, 142–143 (1995), enfd. 121 F.3d 478 (9th Cir. 1997) (sales agreement is producible).

2. Effects Bargaining[13]

TD Barton violated the Act by failing to: notify the Union about the sale of the supermarket; or engage in effects bargaining. An employer's refusal to conduct effects bargaining over a decision to close its operations is unlawful. See, e.g., *Champion International*

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[11] These allegations are listed under pars. 17–21 and 30 of the complaint.

[12] TD Barton has not disputed the request's validity, or its failure to comply.

[13] These allegations are listed under pars. 25, 26 and 30 of the complaint.

Corp., 339 NLRB 672 (2003). Effects bargaining "must be conducted in a meaningful manner and at a meaningful time." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 682 (1981).

TD Barton failed to respond to the Union's combined November 10 information request and effects bargaining demand. I find, as a result, that it violated Section 8(a)(5), by denying the Union an opportunity to conduct effects bargaining over its decision to sell the supermarket.

Although TD Barton asserted that the supermarket's financial collapse and receivership excused its bargaining obligation, its position is invalid. An employer's financial inability to agree to a union's anticipated effects bargaining proposal does not eliminate its obligation to engage in effects bargaining. See, e.g., *Burgmeyer Bros. Inc.,* 254 NLRB 1027, 1028 (1981) (debtor-in-possession under the Bankruptcy Act, which believes it might be financially unable to meet any union demands, still retains its effects bargaining obligation).

3. Unilateral Reduction of Unit Employees' Hours of Work[14]

TD Barton violated the Act, when it unilaterally reduced unit employees' hours of work. An employer must provide adequate notice to the union and bargain concerning changes to unit employees' work schedules. See, e.g., *Sheraton Hotel Waterbury*, 312 NLRB 304, 307 (1993); *General Electric Co.*, 137 NLRB 1684, 1686 (1962). Between August and the November sale of the supermarket, TD Barton unilaterally reduced several unit employees' weekly work schedules. These reductions were implemented without notifying the Union. This conduct, accordingly, violated Section 8(a)(5).

4. Layoffs of Unit Employees[15]

i. Unilateral Layoffs

TD Barton violated Section 8(a)(5), when it unilaterally laid off several unit employees between October 19 and November 10. The complaint, which was amended at the hearing, alleged that it unilaterally laid off the following 16 employees between October 19 and November 10: Juan Gomez; Nelson L. Gomez;[16] Miguel Orellana; Julio V. Sierra;[17] Geraldo N. Maldonado;[18] Carlos D. Santos;[19] Melissa Ruiz; Maria Ramirez; Gillermina V. Ramos;[20] Nayla Almeida; Jose M. Garcia; Nellie Y. Latour; Carlos Peguero; Felix Rodriguez; Mireya Serrano; and Isabel Gomes.[21] The Board has held that, absent an "economic exigency," an employer must provide adequate notice to the union and bargain with it concerning both a layoff decision and its effects. See *Tri Tech Services,* , 340 NLRB 894, 894-95 (2003); *Lapeer Foundry & Machine, Inc.*, 289 NLRB 952, 954–955 (1988).

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14 This allegation is listed under pars. 22 and 30 of the complaint.
15 This allegation is listed under pars. 11, 24, 26, 27 and 30 of the complaint.
16 His name is incorrectly identified in par. 11 of the complaint as Nelson Gomez.
17 His name is incorrectly identified in par. 24 of the complaint as Julio Velez.
18 His name is incorrectly identified in par. 24 of the complaint as Geraldo Nolaco.
19 His name is incorrectly identified in par. 24 of the complaint as Carlos Santos.
20 Her name is incorrectly identified in par. 24 of the complaint as Guillermina Ramos.
21 Par. 24 of the complaint was amended at the hearing to include Almeida, Garcia, Latour, Peguero, Rodriguez, Serrano and Gomes. (Tr. 194–195).

TD Barton's personnel records reveal that, between October 19 and November 10, it laid off the following nine unit employees: Juan Gomez; Nelson L. Gomez; Orellana; Sierra; Maldonado; Santos; Ramirez; Ramos; and Gomes. Diaz acknowledged that mass layoffs occurred at the end of his ownership tenure, and did not aver that any of the above-listed nine employees were separated for misconduct or other cause. It is also undisputed that TD Barton conducted its layoffs, without first notifying the Union or bargaining. I find, as a result, that its unilateral layoff of the latter nine unit employees violated Section 8(a)(5).[22]

TD Barton's personnel records do not reveal, however, that it separated the following seven unit employees between October 19 and November 10: Peguero; Ruiz; Almeida; Serrano; Rodriguez; Garcia; and Latour. These layoffs preceded the complaint allegation, and occurred between May 17 and September 22. I find, as a result, that these layoffs were not encompassed by the complaint. Accordingly, I do not find that these layoffs were unlawful.[23]

ii. Layoffs in violation of procedures in 08-11 CBA

TD Barton violated the Act by laying off Juan Gomez, Nelson L. Gomez and Orellana, in contravention of the 08-11 CBA's express seniority provisions. An employer violates Section 8(a)(5), when during the term of a contract, it unilaterally implements changes in the unit's terms and conditions of employment, without affording the Union notice and an opportunity to bargain. *NLRB v. Katz,* 369 U. S. 736 (1962). The obligation to refrain from unilaterally changing terms and conditions of employment continues after contract expiration and until good faith bargaining results in impasse. *Georgia-Pacific,* 305 NLRB 112 (1991). The 08-11 CBA mandates that layoffs occur in inverse seniority order, and afforded Orellana, the steward, the highest seniority rank. In spite of such language, several less senior employees remained employed, even after Juan Gomez, Nelson L. Gomez and Orellana were laid off. Their premature layoffs, therefore, violated the 08-11 CBA, and were taken without conferring with the Union, obtaining its consent, or reaching an impasse. There is also no evidence of waiver. TD Barton, thus, violated Section 8(a)(5) by conducting the layoffs in this manner.

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[22] The receivership was not an economic exigency, which excused its bargaining duty regarding the layoffs. Diaz conceded that his financial difficulties began as early as 2010. An economic exigency, which justifies a refusal to bargain must be "an unforeseen occurrence having a major economic effect . . . that requires . . . immediate action." *Angelica Healthcare Services Group*, 284 NLRB 844, 853 (1987). In short, TD Barton failed to show that its financial difficulties and receivership were unforeseen events, which excused its bargaining obligation. See *Leiferman Enterprises*, 352 NLRB 152, 154–155 (2008) (significant drop in sales and receivership were not unforeseen); *Toma Metals*, *Inc.*, 342 NLRB 787 (2004) (50-percent decline in sales over 6 months was a chronic condition, which did not excuse unilateral layoffs).

[23] With the exception of Ruiz, Counsel for the Acting General Counsel conceded this matter in her posthearing brief, although she did not formally withdraw these allegations. See (GC Br. at 13, fn. 49 (stating that "[t]he Consolidated Complaint was amended at the hearing to include [Serrano, Almeida, Garcia, Latour, Peguero, Rodriguez and Gomes] . . . . (Tr. 194). H*owever, it appears that, with one exception, those individuals were* ***not*** *laid off involuntarily in Respondent's reduction in force*. The sole exception is . . . Gomes, who was laid off on November 17 and should be included in the Consolidated Complaint. [Emphasis added.]") Concerning Ruiz, who was laid off around June 3, and not raised by counsel, an analogous argument favoring dismissal is persuasive.

5. Failure to Deduct and Remit Union Dues[24]

i. Discontinuation of dues deductions and remittances during term of 08-11 CBA

TD Barton violated Section 8(a)(5) and (d) by discontinuing dues deductions and remittances during the term of the 08-11 CBA. "[A]n employer violates Section 8(a)(5) . . . as elucidated in Section 8(d) . . ., by modifying a term of a collective-bargaining agreement without the consent of the other party while the contract is in effect."[25] *Bonnell/Tredegar Industries*, 313 NLRB 789, 790 (1994), enfd. 46 F.3d 339 (4th Cir. 1995). TD Barton ceased remitting dues and initiation fees to the Union from April 30 through July 31, i.e., during the duration of the 08-11 CBA. This action violated Article 3 of the 08-11 CBA, and, as a result, violated the Act.

ii. Discontinuation of Dues Deduction after expiration of 08-11 CBA

Counsel for the Acting General Counsel asserts that TD Barton's unilateral cessation of dues checkoff after July 31 was similarly unlawful. She contends that, as a policy matter, employers should be required to continue post-expiration checkoff procedures, in the same manner that they are required to maintain wages, benefits, and other mandatory terms and conditions of employment, until a new agreement is reached or a good-faith impasse accrues. She concedes, however, that her position is contrary to longstanding Board precedent. See *Bethlehem Steel Co.*, 136 NLRB 1500 (1962). Although she offers various reasons why such precedent is specious, the Board's most recent decision addressing this matter effectively reaffirmed the precedent, in the absence of a three-member majority to overrule it. See *Hacienda Resort Hotel & Casino (Hacienda III)*, 355 NLRB No. 154 (2010).

Accordingly, in agreement with TD Barton, I find that its unilateral decision to cease dues checkoff after July 31 was lawful. Moreover, "[i]t is for the Board, not the judge, to determine whether that precedent should be varied." *Waco, Inc.*, 273 NLRB 746 fn. 14 (1984), citing *Iowa Beef Packers*, 144 NLRB 615, 616 (1963).

6. Failure to Recognize the Union[26]

TD Barton violated Section 8(a)(5), and 8(d), by withdrawing recognition of the Union on October 12 and by continuously failing to comply with its requests to meet and negotiate a successor contract. Section 8(a)(5) requires an employer to bargain with a union, which represents a majority of its employees. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). In general, an employer, who withdraws recognition from an incumbent union violates the Act. Id. An employer's bargaining obligation continues after the expiration of a contract, unless the union is shown to have lost majority support. Id. The Act similarly requires the parties to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement. *Regency Service*

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[24] These allegations are listed under pars. 16, 26, 27, and 30 of the complaint.

[25] Sec. 8(d) provides, in relevant part, that "the duty to bargain collectively shall also mean that no party to such contract shall [unilaterally] terminate or modify such contract." 29 U.S.C. § 158(d).

[26] This allegation is listed under pars. 13-15, 23, 26 and 30 of the complaint.

Carts, Inc., 345 NLRB 671, 671 (2005). Thus, an employer's wholesale refusal to meet and confer with a union in order to negotiate a successor contract violates the Act. Id.

TD Barton continuously ignored the Union's repeated overtures to schedule bargaining sessions. It ceased dues deductions during the term of the 08-11 CBA, failed to fulfill legitimate information requests and made several unilateral changes. Diaz also openly stated that he would cease recognizing the Union after the 08-11 CBA expired. I find, as a result, that, by engaging in such conduct, it effectively and unlawfully withdrew recognition of the Union.

C. Section 8(a)(3) Allegations[27]

TD Barton violated Section 8(a)(3), when it laid off Juan Gomez, Nelson L. Gomez, and Orellana. The framework for analyzing alleged 8(a)(3) violations is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing that the employee's protected conduct motivated the adverse action. The General Counsel must show, either by direct or circumstantial evidence, that: the employee engaged in protected conduct; the employer knew or suspected that he engaged in such conduct: the employer harbored animus against such conduct; and the employer took the personnel action at issue because of such animus.

Under the *Wright Line* framework, if the General Counsel makes a prima facie showing, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. Once this is established, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action, even absent the protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399, 403 (1983); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting,* 332 NLRB 1363, 1366 (2000). If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for its actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

1. Prima Facie Case

i. Union Activity

Juan and Nelson L. Gomez, and Orellana, each engaged in Union activity. Orellana was a steward, and Juan and Nelson L. Gomez were active Union supporters, who filed grievances and lodged complaints seeking to enforce the 08-11 CBA. TD Barton conceded such activity.

[27] This allegation is listed under pars. 11, 12, and 29 of the complaint.

ii. Knowledge

TD Barton was aware of their Union activities. Polanco, a former supervisor, confirmed that he was aware of such activities.

iii. Animus and Causation

There is ample evidence of Union animus and causation. Such animus included TD Barton's refusal to recognize the Union, ongoing refusal to bargain a successor agreement, unilateral cessation of dues deductions, unilateral layoffs, failure to negotiate over the effects of its closure decision, and Diaz's repeated statements that he was unable to sell the supermarket because of the Union. Animus also included supervisor Durand's commentary that: TD Barton would not recognize the Union after the 08-11 CBA expired; and the Union was responsible for Diaz's inability to sell the supermarket. I find that such animus prompted the layoffs at issue.

iv. Prima facie case under Wright Line

I find, therefore, that counsel for the Acting General Counsel has proven that: Juan and Nelson L. Gomez and Orellana engaged in Union activities; TD Barton was aware of such activities; and union animus triggered their layoffs. Thus, I find that she has met her initial burden of persuasion under *Wright Line*. I will now assess TD Barton's asserted layoff rationale.

2. Pretextual discharge reasons

Although TD Barton explained that the layoffs were caused by a sharp business decline, I find that this explanation is pretextual. Although it is undisputed that the supermarket's business dropped and layoffs were warranted, TD Barton inexplicably abandoned its contractual layoff procedure in order to prematurely target Union supporters Juan and Nelson L. Gomez, and Orellana. The 08-11 CBA clearly required layoffs to proceed in inverse seniority order, which would have preserved the continued employment of Juan and Nelson L. Gomez, who possessed a high level of seniority, and Orellana, who possessed super-seniority,[28] for several additional weeks. When Orellana was laid off, besides Juan and Nelson L. Gomez, there were nine unit employees with lesser seniority and no obvious Union activity, who remained employed.[29] Similarly, when Juan and Nelson L. Gomez were laid off, besides Orellana, there were eight unit employees with lesser seniority and no obvious Union activity, who remained employed.[30] TD Barton conspicuously failed to explain why it abandoned the contractual layoff procedure, in order to prematurely eradicate the Union's primary adherents. Thus, I find that its explanation was pretextual.

Based on my above analysis of TD Barton's layoff rationale, as well as my consideration of the many factors that led me to find animus, and knowledge, I conclude that its proffered reason was a mere pretext and that antiunion animus motivated its actions. Accordingly, no

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[28] The Board has held that super seniority clauses, which are limited to layoffs, are lawful. See *Dairylea Cooperative, Inc.,* 219 NLRB 656, 658 (1975), enfd. sub nom. *NLRB v. Teamsters Local 338,* 531 F.2d 1162 (2d Cir. 1976).

[29] They were Bonilla, Fernandez, Gomes, Maldonado, Ramirez, Ramos, Santos, Torres, and Vasquez.

[30] They were Bonilla, Fernandez, Gomes, Maldonado, Ramirez, Santos, Torres, and Vasquez.

further analysis of its defenses is necessary for, as the Board stated in *Rood Trucking Co.*, 342 NLRB 895, 898 (2004):

> A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminatees absent their union activities. This is because where "the evidence establishes that the reasons given for the Respondent's actions are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). . . .

Conclusions of Law

1. TD Barton was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees performing work covered under the 2008–2011 collective-bargaining agreement between TD Barton and the Union constituted an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all material times, the Union was the exclusive collective-bargaining representative of TD Barton's employees in the above unit within the meaning of Section 9(a) of the Act.

5. TD Barton violated Section 8(a)(1) and (3) of the Act, by prematurely laying off Juan Gomez, Nelson L. Gomez, and Miguel Orellana because of their Union or other protected concerted activities.

6. TD Barton violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide relevant information to the Union, which was requested in its June 24 and November 10, 2011 letters.

7. TD Barton violated Section 8(a)(1) and (5) of the Act by, since on or about November 1, 2011, failing to notify the Union about its sale of the supermarket and neglecting to bargain with it over the effects on unit employees.

8. TD Barton violated Section 8(a)(1) and (5) of the Act by laying off the following nine unit employees between October 19 and November 10, 2011, without affording the Union adequate notice or an opportunity to bargain about such layoffs: Juan Gomez; Nelson L. Gomez; Miguel Orellana; Julio V. Sierra; Geraldo Nolasco Maldonado; Carlos David Santos; Maria Ramirez; Gillermina Venancia Ramos; and Isabel Gomes.

9. TD Barton violated Section 8(a)(1) and (5) of the Act by failing to abide by the terms of the 2008–2011 collective-bargaining agreement by laying off Juan Gomez, Nelson L. Gomez, and Miguel Orellana in violation of the contract's layoff and seniority procedures.

10. TD Barton violated Section 8(a)(1) and (5), and 8(d), of the Act by failing to abide by the terms of the 2008–2011 collective-bargaining agreement by ceasing to remit dues and initiation fees to the Union from April 30 through July 31, 2011.

11. TD Barton violated Section 8(a)(1) and (5), and 8(d), of the Act, by withdrawing its recognition of the Union as the unit's exclusive collective-bargaining representative on October 12, and by continuously failing to comply with to repeated requests to negotiate a successor contract.

12. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that TD Barton has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

TD Barton shall provide to the Union the information requested in its June 24 and November 10, 2011 letters. It shall also remit to the Union, with interest, dues and other fees, as required under the 2008–2011 collective-bargaining agreement for the period extending from April 30 through July 31, 2011. See *King Manor Care Center*, 308 NLRB 884, 887 (1992).

In order to remedy its unilateral and discriminatory layoffs, TD shall make the nine unit employees whole for any loss of earnings[31] they may have suffered by reason of their unlawful layoffs, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010) enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

In order to remedy its unlawful failure to bargain with the Union over the effects of its decision to close the supermarket, TD Barton shall be ordered to bargain with the Union, on request, about the effects of this decision. As a result of its unlawful conduct, however, unit employees have been denied an opportunity to bargain, when TD Barton might still have required their services and a balance in bargaining power potentially existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, it is necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany the bargaining order with a limited backpay requirement designed both to make whole the unit employees for losses suffered as a result of the

[31] Reinstatement and the Board's traditional expunction remedies are not, however, warranted, given that the supermarket has been sold. The nine affected employees are also eligible to receive a *Transmarine* remedy, which will be discussed, concerning TD Barton's failure to engage in effects bargaining over the supermarket's sale.

violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for TD Barton. I shall do so by ordering TD Barton to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp.,* 170 NLRB 389 (1968), as clarified in *Melody Toyota,* 325 NLRB 846 (1998).

TD Barton shall, as a result, pay its unit employees backpay at the rate of their normal wages when last in its employ from 5 days after the date of the Board's decision and order, until the occurrence of the earliest of the following conditions: (1) the date TD Barton bargains to agreement with the Union on those subjects pertaining to the effects of its decision to cease operating the supermarket on the unit employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of the Board's decision and order, or to commence negotiations within 5 business days after receipt of TD Barton's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith. In no event, however, shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which TD Barton ceased its operations to the time they secured equivalent employment elsewhere, or the date on which TD Barton shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, supra, plus interest as computed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra, enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB*, supra.

If feasible, given that the supermarket had been sold, TD Barton is further ordered to distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to its bargaining unit employees, in addition to the mailing of paper notices in English and Spanish. See *J Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[32]

ORDER

The Respondent, TD Barton Foods LLC d/b/a C-Town Supermarket, Pawtucket, Rhode Island, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Discriminating against employees in regard to layoff, in order to discourage their membership and activities on behalf of the Union, or any other labor organization.

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32 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

b. Refusing to provide the Union with requested information that is relevant and necessary to its performance of its duties as collective-bargaining representative of employees in the following appropriate unit: all employees performing work covered under the 2008–2011 collective-bargaining agreement between TD Barton and the Union.

c. Failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of its unit employees, by laying off unit employees, without first affording the Union notice and a reasonable opportunity to bargain over their layoffs.

d. Failing and refusing to bargain in good faith with the Union concerning the effects on employees represented by the Union of its decision to sell the supermarket.

e. Failing and refusing to bargain collectively with the Union by failing to remit dues and initiation fees for April 30 though July 31, 2011, as required under the 2008–2011 collective–bargaining agreement.

f. Failing and refusing to bargain collectively with the Union by laying off unit employees Juan Gomez, Nelson L. Gomez, and Miguel Orellana, in violation of the layoff and seniority procedures set forth under the 2008–2011 collective-bargaining agreement.

g. Failing to recognize the Union as the exclusive collective-bargaining representative of the unit by, inter alia, ignoring its repeated requests to meet and negotiate a successor contract.

h. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Promptly provide the Union with the relevant information requested in its June 24 and November 10, 2011 letters.

b. On request, bargain collectively in good faith with the Union regarding the effects on unit employees of its decision to sell the supermarket and to terminate its employees, and, if an understanding is reached, embody it in a signed document.

c. Make whole all nine bargaining unit employees laid off between October 19 and November 10, 2011, for any loss of pay they may have suffered as a result of their unlawful layoffs, in the manner set forth above in the remedy section of this decision.

d. Remit to the Union dues and initiation fees that were not forwarded to it, as required under the 2008–2011 collective bargaining agreement, with interest to the Union on such sums, as described in the remedy section of this decision.

e. Pay the former employees in the unit their normal wages when in TD Barton's employ from 5 days after the date of this decision until the occurrence of the earliest of the following conditions: (1) the date TD Barton bargains to agreement with the Unions on those subjects pertaining to the effects of the sale of its supermarket; (2) the date a bona fide impasse in bargaining occurs; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision, or to commence negotiations within 5-business days after receipt of TD Barton's notice of desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from the date on which TD Barton ceased its operations to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event, shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in TD Barton's employ, with interest, as set forth in the remedy portion of this decision.

f. Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of any backpay which may be due under the terms of this Order.

g. Within 14 days after service by the Region, Respondent shall duplicate and mail, and, if feasible, electronically distribute, at its own expense, a copy of the notice in English and Spanish, to all former employees employed by it at its Pawtucket, Rhode Island supermarket at any time since April 20, 2011.

h. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., March 7, 2012.

Robert A. Ringler
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. Specifically,

WE WILL NOT fail and refuse to bargain collectively with the Union by failing to recognize it as the exclusive collective bargaining representative of employees in the following appropriate unit: all employees performing work covered under the 2008-2011 collective-bargaining agreement between TD Barton Foods LLC d/b/a C-Town Supermarket and the Union.

WE WILL NOT refuse to provide the Union with requested information that is relevant and necessary to the performance of its duties as the exclusive representative of the unit.

WE WILL NOT fail to bargain in good faith with the Union concerning the effects on the unit of our decision to sell the supermarket.

WE WILL NOT fail to bargain in good faith with the Union by laying off unit employees, without first affording it a reasonable opportunity to bargain about their layoffs.

WE WILL NOT discriminate against employees in regard to layoff, in order to discourage their membership and activities on behalf of the Union or any other labor organization.

WE WILL NOT refuse to bargain collectively with the Union by failing to remit dues and initiation fees required by the collective bargaining agreement, or by laying off unit employees out of order, in violation of the collective-bargaining agreement's layoff and seniority procedures.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL give the Union the information sought in its June 24 and November 10, 2011 letters.

WE WILL, upon request, bargain in good faith with the Union about the effects on unit employees of our decision to sell the supermarket and lay off unit employees.

WE WILL pay unit employees represented by the Union when we sold the supermarket limited backpay, plus interest

WE WILL make Juan Gomez, Nelson L. Gomez, Miguel Orellana, Julio V. Sierra, Geraldo Nolasco Maldonado, Carlos David Santos, Maria Ramirez, Gillermina Venancia Ramos, and Isabel Gomes whole, with interest, for any loss of pay caused by of their unlawful layoffs.

WE WILL make Juan Gomez, Nelson L. Gomez and Miguel Orellana whole for any loss of pay they may have suffered, with interest, as a result of their discriminatory layoffs.

WE WILL remit to the Union dues and initiation fees required by the collective-bargaining agreement, with interest on these sums, for the period running from April 30 to July 31, 2011.

TD BARTON FOODS LLC D/B/A
C-TOWN SUPERMARKET
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, 6th Floor, Boston, MA 02222–1072
(617) 565-6700, Hours of Operation: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (617) 565-6701.